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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1973

BERNARD GRIZAFFI and LEONARD FALCONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BERNARD GRIZAFFI and **LEONARD FALCONE**,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Bernard Grizaffi and Leonard D. Falcone, defendants-appellants in the Court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reproduced in the Appendix to this Petition.

Jurisdictional Grounds

Petitioners seek review of the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the convictions of defendants following a jury trial in the District Court for the Northern District of Illinois. The judgment of the Court of Appeals was entered December 4, 1972. Rehearing was timely sought, and was denied January 2, 1973. Jurisdiction to review this judgment of the Court of Appeals is based on 28 U.S.C. §1254.

Questions Presented for Review.

1. On review of a judgment of guilty based on a jury verdict, should the Court of Appeals review the legal sufficiency of the evidence by looking only to the proof introduced during the government's case-in-chief, or may the Court look also to evidence introduced by the petitioners?

2. An unindicted co-conspirator was subpoenaed by and available to the government, but was not called as a witness; instead, the government "tendered" the witness to the petitioners, but the witness refused to speak to defense counsel, and he did not testify. Should the trial judge have instructed the jury that it might infer that the witness' testimony would have been harmful to the government?

3. Did the Court of Appeals invoke an improper standard in denying the admissibility of an expert accountant witness' testimony?

Constitutional and Statutory Provisions Involved.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The following statutes, for which violations were alleged, are set out in the Appendix to this petition:

18 U.S.C. § 371; § 657; § 1001; § 1006; § 1008; and § 1341.

Federal Rules of Criminal Procedure, Rule 29(a).

Statement of the Case

For purposes of this Petition, the abbreviated statement of the case contained in the opening section of the Opinion of the Court of Appeals is sufficient. Facts relevant to the questions raised in this Petition are concisely summarized below in the sections containing the argument regarding those questions. A full statement of the facts is found in the brief filed upon behalf of petitioners in the Seventh Circuit. Copies of the briefs filed by petitioners and the government will be lodged with the Clerk of this Court.

ARGUMENT

I.

The Holding of the Court of Appeals that the Petitioners Waived Their Right to an Acquittal by Introducing Defense Evidence is in Conflict with the Decisions of Another Court of Appeals and with the Fifth Amendment as Interpreted by this Court.

At the close of the government's case, petitioners moved for an acquittal under F.R.Crim.P. 29(a); the trial court denied the motion. Thereafter, each petitioner introduced evidence including his own testimony. At the close of all the evidence, petitioners again moved for an acquittal; this motion was also denied.

The Court of Appeals held that by presenting evidence in their behalf, petitioners waived their right to appeal the trial judge's ruling that the government's case-in-chief made out a *prima facie* case. The Court held that the sufficiency of the evidence must be weighed by considering the evidence presented by *both* the prosecution and the petitioners. The Court held that, tested by this standard, the evidence was sufficient to support a verdict of guilty.

The conflict among the Courts of Appeal as to whether presentation of evidence by the defendant waives error in a denial of a motion for acquittal at the close of the government's case-in-chief was set forth by Mr. Justice Douglas in his dissent from denial of certiorari in *Maffei* v. *United States*, 406 U.S. 938 (1972):

> "Seven courts of appeals, including the court below, have held that a federal defendant who presents evi-

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dence in his behalf thereby waives any error in a prior denial of a motion for acquittal made at the close of the Government's case. *United States* v. *Haskell,* 327 F.2d 281, 282, n. 2 (CA2); *United States* v. *Feldman,* 425 F.2d 688, 692 (CA3); *United States* v. *Cashio,* 420 F.2d 1132, 1134 (CA5); *United States* v. *Carabbia,* 381 F.2d 133, 138 (CA6); *Cline* v. *United States,* 395 F.2d 138, 144 (CA8); *Viramontes-Medina* v. *United States,* 411 F.2d 981, 982 (CA9); *United States* v. *Greene,* 442 F.2d 1285, 1286-1287, n. 3 (CA10). Two other courts of appeals, however, have held that presentation of a defense is not a waiver. *United States* v. *Rizzo,* 416 F.2d 734, 736, n. 3 (CA7); *Cephus* v. *United States,* 117 U.S.App.D.C. 15, 324 F.2d 893."

The confusion existing on this point of law is illustrated by the fact that on the same day Mr. Justice Douglas filed his dissent in *Maffei,* the Court of Appeals for the Seventh Circuit applied the "waiver" interpretation of Rule 29(a) in *United States* v. *Tubbs,* 461 F.2d 43, 45 (7th Cir. 1972). The opposite holding by the Seventh Circuit in *United States* v. *Rizzo,* 416 F.2d 734, 736 (7th Cir. 1969) was not adverted to in *Tubbs,* even though two of the three members of the *Tubbs* panel had been on the *Rizzo* panel, and the same Judge wrote both opinions.* In the case at bar, the Court of Appeals cited and followed *Tubbs* without discussing *Rizzo.*

The division among the Courts of Appeal has lasted since 1963, when the Court of Appeals for the District of Columbia Circuit decided *Cephus* v. *United States,* 324 F.2d 893 (D.C. Cir. 1963). *Cephus* has been reinforced by later decisions such as *Austin* v. *United States,* 382 F.2d 129, 138

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* In fairness to the Court of Appeals for the Seventh Circuit, it should be noted that *Rizzo* was not cited in any of the briefs in *Tubbs.*

(D.C. Cir., 1967), *Powell* v. *United States*, 418 F.2d 470, 473 (D.C.Cir. 1969), and *United States* v. *Sutton*, 426 F.2d 1202, 1211 (D.C.Cir. 1969).

Most of the cases which adopt the "waiver" interpretation of Rule 29(a) do not contain a careful analysis of the problems, including the fundamental constitutional issues involved. In several of the decisions cited by Mr. Justice Douglas in the passage quoted above, the Court's reference to the "waiver" rule is *dictum*.* The decisions adopting the "waiver" rule cite one another, without discussing the issues of principle arising under the Fifth Amendment created by the rule. The only full discussion of those principles is the *Cephus* opinion, which *rejected* the "waiver" rule. See 2 C. Wright, Federal Practice and Procedure, 246-247 nn. 26-27 (1969) and *cf. United States* v. *Goldstein*, 168 F.2d 666, 668-671 (2d Cir. 1948).

The "waiver" imposed on the petitioners by the decision below required them to choose between two rights and forfeit one of them. A defendant has a right guaranteed by Rule 29(a) to an acquittal if the government has failed to prove a *prima facie* case during its case in chief. The defendant also has a Constitutional right to present evidence in his own behalf and to testify in his own behalf. *Washington* v. *Texas*, 388 U.S. 14, 19 (1967); *Ferguson* v. *Georgia*, 365 U.S. 570, 602 (1961) (concurring opinion). No social policy is served by requiring the defendant to "waive" the second right in order to assert the first simply because the trial judge has erroneously violated the first right by denying

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* *United States* v. *Haskell*, 327 F.2d 281, 282 n.2 (2d Cir.), *cert. denied*, 377 U.S. 945 (1964); *United States* v. *Cashio*, 420 F.2d 1132, 1134 (5th Cir.), *cert. denied*, 397 U.S. 1007 (1970); *Cline* v. *United States*, 395 F.2d 138, 144 (8th Cir. 1968).

the defendant's challenge to the government's failure to prove a *prima facie* case.*

The "waiver" interpretation of Federal Rule 29(a) is in conflict with the Fifth Amendment of the Bill of Rights, as interpreted by this Court in *Garrity* v. *New Jersey*, 385 U.S. 493, 497-499 (1967), and *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964). By hypothesis, the defendant's evidence will only be necessary to make out a *prima facie* case when the government's case-in-chief is insufficient to support a guilty verdict. When it is the defendant's own testimony which supplies a gap in the government's case, that testimony was elicited (again by hypothesis) solely because the trial judge erred in denying a motion for acquittal at the end of the government's case. Reliance upon the defendant's testimony in these circumstances to make out a sufficient case to convict him is contrary to the constitutional policy expressed in the Fifth Amendment that ". . . the government in its contest with the individual shoulder the entire load." *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964).**

When the petitioners gave up their Fifth Amendment right not to testify, it was to rebut government proof—proof which did not establish a *prima facie* case against them. Threatened by conviction on evidence which the trial judge erroneously held to be sufficient to support a

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* This Court in dictum has adverted to the waiver rule applied in some of the circuits as an example of a rule imposing a cruel choice on the defendant who must decide whether to risk bolstering the government's case by introducing evidence on his behalf. *McGautha* v. *California*, 402 U.S. 183, 215-16 (1971). This Court did not decide the correctness of the policy underlying the waiver rule or the constitutional problems inherent in applying the waiver principle.

** This Court has recently reaffirmed that the government has an "obligation to prove its case, unaided by the defendant . . . . " *Turner* v. *United States*, 396 U.S. 398, 408 n.8 (1970).

conviction, the petitioners testified under greater duress than the petitioners in *Garrity* v. *New Jersey,* 385 U.S. 493, 497-499 (1967), who abandoned their privilege in order to avert forfeiture of their jobs. "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress." (385 U.S. at 498.)*

We submit that this Court should take the opportunity to resolve the conflict among the Circuits on this important constitutional issue.

II.

The Court of Appeals Has Applied the Law Regarding the Inference to Be Drawn from Failure to Call a Witness in a Manner Conflicting with this Court's Decision in Graves v. United States.

In this case, the only unindicted co-conspirator, Edward Kelly, remained under government subpoena throughout

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* In the common law of the early 1600's it was assumed that the privilege against self-incrimination only protected a defendant from being compelled to provide the *first* evidence against himself. Since 1680 it has been established that the government must obtain its *prima facie* case from sources other than the individual. 8 J. Wigmore, Evidence (McNaughton revision) 317 (1961). Even commentators who have discussed *abolition* of the Fifth Amendment privilege against self-incrimination have thought it necessary to require the Government to establish a *prima facie* case before the defendant is called to testify:

> "Suppose privilege against self-incrimination for any criminal defendant were abolished, but a requirement retained that the prosecutor must make his prima facie case without relying upon testimony from the defendant — this requirement being surely a minimum indispensable safeguard under good common law tradition." J. Maguire, Evidence of Guilt, 12-13 (1959).

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the prosecution's case-in-chief. He was the Chief Operating Officer of the institution whose transactions formed the basis of the indictment. He participated in virtually all of the transactions about which proof was offered by the government. He was, in short, a key witness to this case.

At the close of his case, the prosecutor announced that Kelly was in his office. "I decided not to use him [Kelly] as a witness. I tender him to defense counsel for use as their witness." (II App. 467.)* These remarks are a virtual concession of the prosecution's power over Kelly. It is equally clear from the prosecutor's remarks that Kelly was willing to testify for the government, and further that the government had talked to Kelly and knew what his testimony would be. The prosecutor later informed the Court that "the length of our case depended on our using Mr. Kelly or not. Mr. Kelly has been here all week. I have tried to avoid making categorical statements as to whether or not I was going to use him. I did not, in fact decide until last night not to use him." (II App. 489.)

During a recess Kelly declined to speak to defense counsel before being called as a witness. (II App. 480.) Defense counsel informed the Court that they would not call Kelly as a witness for that reason. (II App. 480.)

In *Graves* v. *United States*, 150 U.S. 118, 121 (1893), this Court stated that "... the rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that

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* References are to Volumes I through III of the Appendix filed in the Court of Appeals. Copies of that Appendix will be lodged with the Clerk of this Court.

the testimony, if produced, would be unfavorable.'"* The question whether a witness is peculiarly within the power of one side or the other to produce has been interpreted to extend beyond physical availability, and has been given a pragmatic, realistic interpretation which was not followed by the Seventh Circuit in this case.**

In the case at bar, it is clear that Kelly was available to the government, and that the prosecutor knew what Kelly's testimony would be. It is equally clear that, as a practical matter, Kelly was not "available" to the defense; defense counsel had no way of knowing what Kelly would say if called to the stand.

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* In *Graves* this Court found that the accused was not required to produce his wife because she was not a competent witness, and therefore held that the district attorney should not have been permitted to mention the absent wife in his closing argument. In the case at bar, defendants requested that the jury be informed that they were permitted to draw an unfavorable inference in the form found in *La Buy, Jury Instructions in Federal Criminal Cases*, 33 F.R.D. 523, 601, 602. That request was refused (II App. 33; III App. 963).

** *McClanahan* v. *United States*, 230 F.2d 919, 926 (5th Cir.), *cert. denied*, 352 U.S. 824 (1956) (". . . the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case."); *Burgess* v. *United States*, 440 F.2d 226, 231-239 (D.C. Cir. 1970) (government informer was not equally available to defense even though government produced him in court, but a reversal was not called for where the government had introduced other eye witness evidence.) (Opinions of J. J. Fahy and Robinson.)

The "tender" of Kelly to the defense should not be sanctioned, as it was by the Court of Appeals, as a device for giving the appearance of equal availability. The statement by the Seventh Circuit that there was no reason for defendants to be more apprehensive about Kelly's testimony than for the government to be apprehensive is a perversion of the inference described in *Graves* v. *United States*. This Court should clarify the ground rules in this important area, so that the government is not able to give the mere appearance of equal availability of witnesses.*

III.

The Rule of the Court of Appeals Excluding Petitioners' Expert Accounting Testimony Is a Departure from Principles Underlying the Decision of this Court in Johnson v. United States.

The indictment charged petitioners, *inter alia*, with causing the books and records of a savings and loan falsely

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* Defendants recognize that there may be other reasons, as in *Burgess* v. *United States*, 440 F.2d 226, 231-239 (D.C. Cir. 1970) (cumulative testimony where eye witness testimony produced) for the government's not calling a witness peculiarly within its power, but in the case at bar this point could not be seriously argued. Virtually every witness who testified about the transactions in this case mentioned Edward Kelly, Chief Operating Officer of Apollo. The government argued to the Seventh Circuit that the conspiracy was provable by inference. Kelly was the only unindicted co-conspirator in Count I under which petitioners were convicted, and Count I is the scheme which also forms the basis of the mail fraud Counts IV through VI under which petitioners were also convicted. Therefore, the inference is strong that Kelly would have elucidated the transactions.

to reflect substantial income from the sale of real estate and misapplication of funds.

Petitioners offered the expert testimony of an accountant and savings and loan analyst to the effect that the principal transaction in the case (the Georgetown transaction) would have yielded substantial income to Apollo Savings and Loan.

The Court of Appeals accepted "arguendo" the relevancy of the evidence, but held that the accountant's testimony was excludable because the calculations he made involved simple arithmetic.*

The rule announced by the Court of Appeals focuses upon the simplicity of the arithmetical operations performed by an accountant, such as addition, subtraction, and multiplication, but ignores the skill and expertise required to select the relevant figures from a number of documents and the analysis and judgment required to decide what computations should be performed to arrive at a conclusion. In the instant case, the expert's computations consisted of

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* The Court of Appeals later in its opinion referred to the evidence as of "questionable relevance." The Court of Appeals' earlier assumption of relevance was clearly correct, however. The jury might have concluded from the evidence that the savings and loan stood to make substantial profits from the transaction, and that petitioners were engaged in bona fide transactions and did not intend injury to the savings and loan association. *Compare United States* v. *Matot*, 146 F.2d 197, 198 (2d Cir. 1944); *Duvall* v. *United States*, 94 F.2d 911, 913 (3d Cir. 1938). See also *Hudson* v. *United States*, 55 F.2d 591, 596 (8th Cir. 1932). The point was an important one in showing petitioners' intent in the transactions assailed in the indictment. Petitioners' intent was a crucial element in the government theory of misapplication of funds.

simple arithmetic* but his financial analysis was addressed to an issue calling for expert judgment: the profit and loss effect upon Apollo of several transactions involved in this case.**

The decision of the Court of Appeals results in application of a double standard to this kind of proof. Over defense objections, the District Judge permitted a government witness to testify to the effect that certain reported profits had upon Apollo's ability to make its dividends (II App. 241-245), and to his opinion as to what "good accounting practices in the hypothetical situation" would have called for (question put by the District Judge, II App. 232; also II App. 246-8). Application of this double standard is

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* The computations required, in the expert's opinion, to calculate net gain were set out in Petitioners' Grizaffi & Falcone Exhibit 63, which the expert had prepared, drawing upon other exhibits which were properly in evidence. Exhibit 63, of course, did not explain the expert's reasoning in making his computations, but the law requires such exhibits to be simple and non-argumentative:

> "Whenever possible, such charts should be confined in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert . . . witnesses, and they should not be encumbered by . . . impressive, conclusionary captions . . . ." *Lloyd* v. *United States,* 226 F.2d 9, 17 (5th Cir. 1955).

** Defense counsel stated in his summary offer of proof (III App. 930):

> "I offer to prove, your Honor, that under the hypothetical, which is based on the facts in the record, with respect to net investment costs, the options which are in the record, the valuations and appraisals which are in the record, that the net gain to Apollo if the option under the August 30, 1967, contract were exercised by Mr. Grizaffi and Mr. Falcone, would have been $394,699.
>
> "Secondly, I offer to prove that, based on the same figures and the appraisals of Mr. Foley, that the net gain to Apollo or to the hypothetical owner of the land would be $1,275,646, as of May 1969, which was still during the indictment period."

inconsistent with the decision of the Third Circuit in *United States* v. *Caserta*, 199 F.2d 905, 908 (3d Cir. 1953) which held that it was error to exclude defendant's accountant's testimony in view of the fact that the prosecution had presented accountant's testimony.

The rule applied by the Court of Appeals is in conflict with *United States* v. *Johnson*, 319 U.S. 503, 519-520 (1943), in which this Court held that an expert accountant may testify to computations of income and expenditures based on facts which are in evidence, as an aid to the jury's determination. It also is in conflict with other decisions of Courts of Appeals. The value of accounting testimony in assisting the jury was recognized by Judge Learned Hand in *United States* v. *Kelley*, 105 F.2d 912, 918 (2d Cir. 1939):

> "The prosecution's accountants were allowed to present their calculations from the books and returns in evidence. This kind of evidence is always admissible; a jury without such guidance would be totally unable to cope with complicated accounts."

See also *Wirtz* v. *Turner*, 330 F.2d 11, 14 (7th Cir. 1964).

It is interesting to note the contrast between the approach taken by the panel of the Court of Appeals for the Seventh Circuit in this case and that taken by another panel of the Seventh Circuit in *United States* v. *Dellinger*, (7th Cir. November 21, 1972) Docket No. 18295, which held that exclusion of expert testimony was an abuse of discretion where the subject was not equally within the realm of experience of jury members and experts (Slip Opinion p. 62):

> "The resulting presumption that informed opinion will be admitted seems particularly appropriate in our increasingly complex society where specialization and segmentation of knowledge are common, in everyday living as well as at highly technical levels, and in our pluralistic society with its kaleidoscope of political views and life styles. At the same time it seems that people (including jurors), unexposed to increasing pro-

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portions of relevant knowledge and experience, are becoming more capable, because of greater education, of evaluating the expression of expert opinion."

The characterization as basic arithmetical computations of petitioners' accountant's conclusions on the amount of profit realized from a complex transaction is a departure which misconstrues the function and value of expert testimony, and requires correction and clarification by this Court.

CONCLUSION

Petitioners pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February 1, 1973.